



June 14, 2002

Mr. L. Charles Van Cleef
Brown McCarroll L.L.P.
P.O. Box 3999
Longview, Texas 75606-3999

OR2002-3220

Dear Mr. Van Cleef:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#164366.

The Pine Tree Independent School District (the "district"), which you represent, received a request for six categories of information related to district insurance coverage and an accident involving a district bus. You state that the district holds no information responsive to category 4 of the request, but that, "[i]n an abundance of caution," you have submitted the two documents in Exhibit 5. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code, and under section 101.104 of the Texas Civil Practice and Remedies Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by finding that a portion of the information at issue is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 522 of the Government Code unless they are expressly confidential under other law. The submitted records in Exhibit 5 appear to be evaluations, which fall under the purview of section 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. The information in Exhibits 2, 3, and 4 fits into the subsection (3) category for "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." We will consider whether other law makes any of this information confidential.

You do not claim that section 552.108 is applicable to the information in Exhibit 5. You argue that section 552.103 excepts this information from public release. However, section 552.103 is a discretionary exception to disclosure that protects the governmental

body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Thus, the evaluations in Exhibit 5 may not be withheld under section 552.103. As you also argue that sections 552.101 and 552.102 are applicable to this information, we address your claims.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* While you state that the subject of the evaluations is presently a teacher who holds a certification under chapter 21 of the Education Code, you do not inform us that the individual was a teacher at the time of the evaluations. Based on the reasoning set out in Open Records Decision No. 643, we conclude that if the individual was a teacher at the time of the evaluations, the documents at issue are confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. In the event that the individual was not teaching at the time of his evaluations, section 21.355 of the Education Code is inapplicable, and the information in Exhibit 5 may not be withheld under section 552.101.

You also argue that section 552.102 of the Government Code excepts the information in Exhibit 5 from public disclosure. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children,

psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Based upon our review of the information at issue, we find that it is not the type of information considered intimate and embarrassing under the standard articulated in *Industrial Foundation*. Thus, this information may not be withheld from disclosure under section 552.102.

You argue that the information in Exhibits 2, 3, and 4 is protected from disclosure under section 101.104 of the Texas Civil Practice and Remedies Code, which provides as follows:

- (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].
- (b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104; *see In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute "prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claim] Act"). We believe this discovery provision applies to the section 552.022 information. Furthermore, section 101.104 of the Texas Civil Practice and Remedies Code consists of other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Therefore, we conclude that the district must withhold from the requestor the information in Exhibits 2, 3, and 4.

We next consider your claim for the information in Exhibit 7. Exhibit 7 is not subject to section 552.022. You assert that section 101.104 of the Texas Civil Practice and Remedies Code prohibits the disclosure of the information in Exhibit 7. Because Exhibit 7 is not subject to section 552.022, we will assume that you bring this claim under section 552.101. *Id.* Section 101.104 prohibits the discovery and admission of insurance information during a trial under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.--Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under the Tort Claims Act). It does not make insurance information confidential for purposes of section 552.101 of the Public Information Act. *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"). Chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Gov't Code §§ 552.005 (chapter 552 does not affect scope of civil discovery), .006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552); Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) *overruled in part by* Open Records Decision No. 647 (1996) (section 552.101 does not encompass discovery privileges). We do not believe that section 101.104 makes

confidential the submitted information in Exhibit 7 for purposes of section 552.101. As you raise no other exception to disclosure of this information, it must be released to the requestor.

You next argue that the submitted information in Exhibits 5 and 6 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish that section 552.103 is applicable to the information for which it claims this exception. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be withheld under this exception. *Id.*

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that the requestor contends that his vehicle was struck by a district bus, and that his daughter was injured in the accident. You inform us that the district has received a notice

of claim letter asserting the limited waiver of sovereign immunity of the TTCA. Furthermore, you state that the notice of claim is based on allegations of negligent use of district property and lack of sufficient insurance, and that the submitted information is related to the circumstances surrounding the vehicular accident. Thus, except as indicated below, we conclude that the district may withhold the remaining submitted information under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103 ends once the related litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the information submitted in Exhibits 2, 3, and 4 must be withheld from public disclosure under section 101.104 of the Civil Practice and Remedies Code. The information in Exhibit 7 must be released to the requestor. Provided that the individual was a teacher at the time of the evaluations, the documents in Exhibit 5 are confidential under section 21.355 of the Education Code, and must be withheld under section 552.101. Otherwise, the information in Exhibit 5 must be released to the requestor. With the exception of information that has either been obtained from or provided to the opposing party in the anticipated litigation, which must be released, the district may withhold the remaining submitted information under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

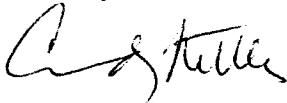
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CMN/seg

Ref: ID# 164366

Enc: Submitted documents

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(w/o enclosures)